No. 95-1380

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In The Supreme Court Of The United States

OCTOBER TERM, 1995

BRENDHAN B. HARRIS,

Petitioner,

v.

THE CITY OF VIRGINIA BEACH, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a police officer's speech concerning the supervisory actions of his supervisor toward him, and affecting no other persons, a "matter of public concern?"

II. Does a police officer's speech concerning the supervisory actions of his supervisor toward him and affecting no other persons become a "matter of public concern" when the speech is made to a magistrate with the obvious goal of punishment of the supervisor for the supervisory actions with which the officer disagrees?

III. Where a police department has officially investigated a police officer's allegations of wrongdoing by his supervisor and determined not to take any action, does the First Amendment allow that officer in his official capacity to then criminally prosecute the supervisor without being subject to disciplinary action?

IV. Does the record support the conclusion of the court of appeals that Harris had not engaged in "speech" protected by the First Amendment?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

I. Introduction 1

II. Salient Facts 2

A. Harris observed neither "criminal activity" nor "corruption" 2

B. Harris's "speech" to the magistrate is his version of these actions by Van Auken 3

C. At Harris's request, the magistrate translated these supervisory actions into charges of criminal conduct 5

Table of Contents (continued)

Page

THE PETITION SHOULD BE DENIED 6

I. This case (and record) is not an appropriate choice for review 6

II. The court of appeals aptly applied *Connick* 6

III. The record supports the court of appeals' conclusion that Harris's speech was not a matter of "public concern" 9

IV. The "split" among the Circuits is illusory 11

V. The court of appeals decision is a just resolution of this case 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases	Page(s)
Connick v. Myers, 461 U.S. 146, 103 S.Ct. 1684 (1983)	*Passim*
Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, reh'g denied, 483 U.S. 1056, 108 S.Ct. 31 (1987)	6

STATEMENT OF THE CASE

I. Introduction

On August 28, 1992, Virginia Beach police officer Brendhan Harris answered a call in which a fight ensued between Harris and two women (Diedre Gamble and Terry Grey). Harris felt that charges should be brought against the women and took Gamble into custody after subduing her with pepper gas. Master Police Officer A. N. Ortiz, on scene to back-up Harris, reported to Lieutenant G. M. Van Auken, the shift supervisor, his concern that Harris mis-handled the incident and precipitated the altercation. Van Auken consequently advised Harris to take no further action until the matter could be investigated. Disregarding Van Auken's instruction, Harris that same day obtained warrants against Gamble and Grey. Harris had Gamble served; Van Auken a couple of days later took possession of the unserved warrants against Grey. The charges against Gamble were nol-prossed on the day of trial, September 30, at the request of Van Auken. At all times Van Auken acted with the knowledge and concurrence of his superiors.

Harris made an official complaint against his precinct commander Captain E. E. Rorrer, and Van Auken, specifically challenging the actions taken and orders given by Van Auken relating to the August 28 incident. This complaint was formally investigated and the actions of Rorrer and Van Auken determined to be appropriate.

The investigation into Harris's on-scene handling of the August 28 incident, and Harris's subsequent actions contrary to the instructions of Van Auken, resulted in Harris receiving an eight hour suspension from duty and a written reprimand. Personnel review board action on Harris's appeal of this disciplinary action was pending on July 30, 1993.

Harris took matters into his own hands again on July 30, 1993, when, on duty and in uniform, he obtained criminal summonses against Van Auken for obstruction of an officer in the performance of his duties and failure to serve warrants.

This insubordinant act resulted in disciplinary action which led to Harris's dismissal from the police department.

II. Salient Facts

A. Harris observed neither "criminal activity" nor "corruption."

The following is the conduct which Harris observed after the altercation between Harris and the two women and the report by officer Ortiz that Harris may have acted inappropriately. In each instance, Van Auken acted in consultation with his superiors.

(1) In telephone conversations with Harris after Harris had arrested Gamble and taken her to the hospital for treatment of the pepper gas he had used to subdue her, Van Auken directed Harris to release Gamble and allow her to be interviewed by Internal Affairs. (Tr. 65, 266-271, 615-619.)

(2) Van Auken, at the direction of Captain Rorrer, accepted from Harris the unserved warrants against Grey which Harris had obtained, contrary to orders from Van Auken, and placed them either on his desk or in his desk drawer. (Tr. 71-72, 275-278.)

(3) Van Auken appeared in court on September 30, 1992, the day the charges against Gamble were set for trial, and, in the absence of the assistant City Attorney assigned to the case (who was temporarily in another courtroom when the case was called), advised the court that the City desired to nolle prosequi the charges. Van Auken also presented to the court a letter to the City Attorney requesting the charges be nol prossed. Van Auken had drafted and prepared the letter on behalf of Deputy Uniform Division Commander Captain M. E. Beane. (Tr. 74, 280, 286-287.)

B. Harris's "speech" to the magistrate is his version of these actions by Van Auken:

> To the best of my recollection, I advised the magistrate of the facts surrounding Lt. G.

M. Van Auken's retrieval from me and refusal to have served certain warrants issued for the arrest of Terry Gray (sic) and his providing false information to the Court in a letter dated September 29, 1992 addressed to William Bynam (sic), which he had initialed with the initials of Captain M. E. Beane, and submitted in Court in support of a motion to "nol pros" a proceeding against Diedre Gamble. Specifically, I informed the magistrate that I was instructed to give to Lt. Van Auken the warrants against Ms. Gray (sic). I personally handed the warrants to Lt. Van Auken and he placed the warrants in his desk, in my presence and that, to my knowledge at the time, the warrants were still in Lt. Van Auken's possession. I also informed the magistrate that at least three of the representations set forth in the September letter to Mr. Bynum (sic) were, to my knowledge, completely false, and that I understood and believed that the Judge of the General District Court relied on these misrepresentations authored and initialed by Lt. Van Auken in deciding to nol pros the case against Ms. Gamble.

(Harris, in his sworn answer to Interrogatory 2, Def. Summary Judgment App., 298-299.)

C. At Harris's request, the magistrate translated these supervisory actions into charges of criminal conduct.

Based upon the "sworn statement of: Off. B.B. Harris, 2nd Prct/VBPD, VBeach, VA." given just after midnight on the morning of July 30, 1993, three summonses were issued by the magistrate charging that Van Auken did:

> (1) [O]n or about August 28, 1992 . . . unlawfully Without just cause, knowingly obstruct a law-enforcement officer in the performance of his duties as such in violation of Section 18.2-460, Code of Virginia.
>
> (2) Diverse Days August 31-September 30, 1992 . . . Willfully and corruptly omit or delay to execute such process, whereby such person shall escape or go at large in violation of Section 18.2-469, Code of Virginia.
>
> (3) [O]n or about September 30, 1992 . . . unlawfully Without just cause, knowingly obstruct a law-enforcement officer in the performance of his duties, as such in violation of Section 18.2-460, Code of Virginia.

(Ex. A-9, JA 326-331; Tr. 98.)

THE PETITION SHOULD BE DENIED

I. This case (and record) is not an appropriate choice for review.

Although this case arises from a complex factual setting which includes a police response to a burglary, an altercation and arrest, the police department's management of that response, citizen complaints, personnel grievances, at least three separate Internal Affairs investigations, a lengthy personnel review board hearing, and various administrative actions by police department officials[1], the truly relevant facts are simple. And the legal conclusion is straightforward. It is hardly a case for review by this Court. *Cf.*, *Rankin v. McPherson*, concurring opinion by Justice Powell, 483 U.S. 378, 392-394, 107 S.Ct. 2891, 2901-2902, reh'g denied, 483 U.S. 1056, 108 S.Ct. 31 (1987).

II. The court of appeals aptly applied *Connick*.

Connick v. Myers, 461 U.S. 146, 103 S.Ct. 1684 (1983) provides the guidance for determining whether or not Harris's claimed protected speech is, as a matter of

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[1] All of which is reflected in a commensurately complex record (Defendant's Summary Judgment Appendix, alone, is 820 pages; the trial transcript 846 pages).

law, indeed protected by the First Amendment. The language of *Connick* is straightforward:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable. (Citations omitted.)
>
> * * *
>
> Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

461 U.S., at 146-148, 103 S.Ct., at 1690. Furthermore,

> **[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark--and certainly every criticism directed at a public official--would plant the seed of a constitutional case. While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.**

***Id.*, 461 U.S., at 149, 103 S.Ct., at 1691.**

The content of what Harris told the magistrate was that Van Auken did three things as a police lieutenant supervisor in the performance of his supervisory responsibilities with which Harris disagreed. The form in which Harris spoke these words was to the magistrate seeking to subject his supervisor to misdemeanor criminal charges. The context in which this was spoken was as an on duty, in uniform, police officer seeking to unilaterally bring criminal charges against his supervisor for these actions in the larger, overall, context of his continued disagreement with the three supervisory actions taken by Van Auken. The content of these words *as translated by the magistrate* into misdemeanor criminal charges are the charges as written.

Thus, eleven months after the event, Harris again complains about and challenges the judgment and

authority of his immediate supervisor to act on behalf of the police department with respect to an altercation which occurred on Van Auken's watch and involved Harris: Harris still does not accept Van Auken's determination that because of the manner in which the August 28 incident evolved, no charges should be brought.

Measuring this claimed protected speech--the information given the magistrate which resulted in charges against Van Auken--against the *Connick* benchmarks of content, form, and context unequivocally confirms that this is not the voicing of any matter of legitimate public concern, but Harris's continuing pursuit of his personal grievance.

III. The record supports the court of appeals' conclusion that Harris's speech was not a matter of "public concern."

Although replete with references to "criminal activity" and "exposing police corruption," Harris's Petition--and the record--is simply devoid of any facts to substantiate these references.[2] It is clear that the "criminal misconduct by a police lieutenant" which Harris was ostensibly "exposing" (a) existed only in Harris's

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[2] Nor is this case about "corruption by public servants," "corruption within the ranks of law enforcement," "strong evidence implicating a government official," or "restoring integrity."

mind[3], (b) affected only Harris and his supervisor Van Auken, (c) became "criminal" only by the magistrate's leap of faith at the unilateral request of Harris, and, (d) other than the passing interest presumably shared in *anything* that happens in a municipal police department, neither interested nor affected the public.

Harris takes issue with the conclusion of Circuit Judges Luttig and Williams that there was "a virtual absence of evidence in the record indicating that Harris was 'exposing' any corruption whatsoever . . .." (Harris Petition at 14, n.12), but fails to identify any such evidence. And, indeed, he cannot.

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[3] **(1) Because he was aware of a standing general order that custody of a prisoner was the sole responsibility of the arresting officer, Harris *questioned the legality of Van Auken's directive* [that Gamble be released from custody]. (Harris Petition, at 4; emphasis added.)**

(2) Because he was aware of a Virginia statute that required that criminal warrants be served forthwith, Harris *questioned Van Auken's conduct* [in taking from Harris the Grey warrants which precinct commander Rorrer had directed Harris to give to Van Auken]. (Id., at 5; emphasis added.)

(3) Harris obtained a copy [of the letter given to the court by Van Auken in support of the City's motion to nol pros] and *concluded that it contained a number of false and/or misleading statements*. (Id; emphasis added.)

IV. The "split" among the Circuits is illusory.

The analysis of Harris's claimed protected speech under *Connick* inexorably leads to the same conclusion whether or not "content" or "context" is first considered. Harris's arguments that "motivation" was, is, should, or shouldn't be a part of the calculus ignore the reality of the situation, as reflected in the entire record.

V. The court of appeals' decision is a just resolution of this case.

The decision of the court of appeals preserves the authority and responsibility of a police department to supervise its police officers. To hold otherwise would be to sanction a police officer charging his or her supervisor with "obstruction of justice" every time that officer's view of "justice" is impinged upon by supervisor action, and would impair the department's ability to effectively exercise control over its police officers.

Harris knew what the department's position was with respect to the August 28 incident.[4] And, until he sought to punish Van Auken for his perceived transgressions by couching the supervisory actions he disliked in the form of criminal charges and seeking

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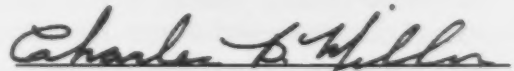
[4] See, for instance, the September 30 letter to Harris from Captain Rorrer (Ex. A3, JA 317-318; Tr. 81).

misdemeanor convictions and fines, he had formally complained to the uniform division commander, been reassigned to another precinct, and appealed the relatively minor disciplinary action[5] to the independent personnel review board *without* retribution or recrimination.

CONCLUSION

Connick provides the law governing the First Amendment protection afforded public employees. It is well-established precedent which provides clear guidance. The court of appeals has followed *Connick*, neither abridging, amending, nor expanding its application in the process.

The petition for certiorari should be denied.



Of Counsel

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[5] Two separate conduct reports against Harris resulted from the August 28 incident: One, charging excessive force and failure to assist citizen, was a consequence of Grey's citizen complaint, and resulted in a four hour suspension from duty and a written reprimand, which was reduced upon review and grievance appeal procedure to a four hour suspension. The second, for failure to follow Van Auken's orders regarding further action, charged disobedience of orders and insubordination, and initially resulted in a suspension of 24 hours, which was reduced upon review and grievance to four hours suspension and a written reprimand. (Gamble's complaint against Harris was dismissed as "unfounded".)

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